LIBRARY
SUPREME COURT U.S

Office - Supreme Court, U. S.
FILED
MAR 10 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 542.

ANNA M. FOUNTAIN, *Petitioner*,

v.

PAUL FILSON AND ANNA F. FILSON, *Respondents*.

OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

CAMDEN R. MCATEE,
Attorney for Respondents.

INDEX.

	Page
Opinion below	1
Jurisdiction	1
Federal Rules	2
Question Presented	2
Opposition	3
Statement	3
Argument	4
Adjectival argument of petitioner	4
Substantive rights paramount to procedure	4-5
No carelessness of respondents	5
Rules 54(c) and 56(d) are controlling and applied in decisions	6
Petitioner tender of testimony insufficient	9
Conclusion	10

FEDERAL RULES AND CITATIONS.

Rule 54(c)	2
Rule 56(d)	2
Moore's Federal Practice	5, 6, 8, 9
Aetna Insurance Co. v. Kennedy, 301 U. S. 389, 81 L. Ed. 1176	4
Camp v. Boyd, 229 U. S. 530, 552, 57 L. Ed. 1317, 1327	5
Cone v. West Virginia P. & P. Co., 330 U. S. 571	4
Globe Liquor Co. v. San Roman, 332 U. S. 571	4
Hooker v. N. Y. L. Ins. Co., 66 Fed. Supp. 312, 348	8
Northland Greyhound Lines v. Amalgamated Assn., 66 Fed. Sup. 431, 483	7
United States v. Erie Co., 8 F. R. D. 493	7
United States v. Sherwood, 312 U. S. 589, 590, 85 L. Ed. 1058, 1063	4
Walling v. Richmond Screw Anchor Co., 154 F. (2) 780, 784	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 542.

ANNA M. FOUNTAIN, *Petitioner*,

v.

PAUL FILSON AND ANNA F. FILSON, *Respondents*.

OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

OPINION BELOW.

The only opinion is that of the Court of Appeals (R. 62), as yet not reported.

JURISDICTION.

The Court of Appeals entered its judgment on October 18, 1948 (R. 67), and on December 16, 1948, denied a timely motion of petitioner for its modification. Jurisdiction herein is invoked under 28 U. S. C. A., Section 1254(1) and 2101(c).

FEDERAL RULES.

Rule 54(d), as effective in compliment to Rule 56(a)(b)(c) but not set out nor referred to in the petition, or its appendix, is as follows:

> "* * * * Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Rule 56(d) also entirely applicable, but not set out or referred to in the petition or its appendix, is as follows:

> "(d) Case not Fully Adjudicated on Motion. If on motion under this rule judgment (for summary judgment) is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." (Our parenthetical insertion for clarity.)

THE QUESTION PRESENTED.

The propriety of application of Rules 54(d) and 56(d), instead of partial reliance by petitioner on Rule 56(a)(b)(c) as justifying the entry in the District Court sitting in equity of final judgment in favor of a party where only the adverse party has moved for summary judgment.

THE OPPOSITION.

Respondents respectfully propound the appellate direction of the primary duty of the District Court entirely conforms to and is required by Federal Rules 54 and 56.

STATEMENT.

The case presents that the Filsons invested $15,000 in a property in New Jersey being $7,000 cash as purchase money, and $8,000 spent in improvements, with the bills shown to and admitted by the Fountains, the prospective purchasers, who admit no gift to them was intended by or in reference to the subsequent transfer of title. The Filsons recouped $9,000 by mortgages on the property, leaving $6,000 as their invested equity. Upon conveyance by the Filsons, to the use of Fountains as joint tenants in the entireties in consideration of Fountain assumption of the $9,000 of mortgages, the Foutains jointly granted the Filsons a first option within three years to repurchase for $9,000 unless the Fountains paid them $6,000 in discharge of the option, thus making a total of $15,000 as the Fountain obligation payable to perfect their title. When the option expired as unexercised and the $6,000 was not paid, a joint obligation of the Fountains to pay $6,000 to the Filsons remained in full effect.

Upon denial by the Fountains of the obligation and for recovery thereof, the Filsons sued the Fountains in equity in the District of Columbia, where they were residing, to claim recovery of $6,000 and its security by placement of a resulting trust therefor on the property, and for general relief. After depositions in discovery as upon cross examination were taken by each party, Brainard Fountain died, and his wife, the present petitioner, was appointed his administratrix.

The action came before the District Court upon a Filson motion for the substitution of party and upon a Fountain motion for summary judgment on the ground that no re-

sulting trust arose from the deed and option under the New Jersey law.

The District Court denied the substitution, granted the summary judgment, and summarily dismissed the complaint in disregard of the claim for money and general relief.

The appellate court, agreeing no resulting trust arose, but disagreeing about the substitution of party and right to a money judgment as general relief, held the District Court in its equitable jurisdiction of the parties and subject matter, should have retained the case to do full justice. Finding the Fountain title and indebtedness were admittedly joint, in reversal, it adjudged and directed the District Court to enter judgment for $6,000 against the petitioner, Fountain, individually and as administratrix of her late husband. Her subsequent motion for modification of the Appellate Court judgment into a remand for further proceedings was denied. Thereupon, the mandate was stayed to permit application for writ of certiorari.

ARGUMENT.

Petitioner, by adjectival argument, rested upon *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, and *Cone* v. *West Virginia P. & P. Co.*, 330 U. S. 212, would enlist the discretion of this Court, notwithstanding those decisions only conform to the rule previously established in *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, 81 L. Ed. 1176, as adherence to the basic principle that substantive right prevails over procedure, more definitely stated in *United States* v. *Sherwood*, 312 U. S. 584, 590, 85 L. Ed. 1058, 1063, as follows:

> An authority conferred on a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction, and the Act of June 19, 1934, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants, or to enlarge or diminish the jurisdiction of federal courts.

The paramount substantive right in equity is stated in *Cange* v. *Boyd*, 229 U. S. 530, 552, 57 L. Ed. 1317, 1327, as follows:

> A court of equity ought to do justice completely and not by halves (citations omitted).
>
> One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a case for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authorities (citations here omitted).

Petitioner relying (pp. 7-8) on *Walling* v. *Richmond Screw Anchor Co.*, 154 F. (2) 780, 784, that each party having moved for summary judgment, either, as against the adoption of the opposing legal theory, may urge the existence of a genuine material fact, proceeds to complain as follows:

> Under the decision below petitioner has lost that opportunity solely because of respondent's carelessness in not moving for summary judgment. Respondents, on the other hand, have profited by their own failure to follow the procedure contemplated by the Rules.

This eagerness of argument or complaint is in disregard of the Rules and their necessary and actual application. It overlooks that Rule 56(d) provides as a necessary incident, where a summary judgment is rendered, for the further precise examination by the Court of the case to the end of effecting a pretrial summary confining further proceedings upon the actual and material facts in controversy and "directing such further proceedings as are just."

Thereof in 3 Moores Federal Practice 56.01, p. 3175, it is stated:

> "The Court is authorized to examine evidence, not for the purpose of trying an issue, but to determine whether there is a genuine issue of fact proper for

trial. If there is no genuine issue of fact in controversy, the parties are not entitled to a trial and the court, applying the law to the undisputed material facts may render a summary judgment. If there is a genuine issue as to a material fact, the case will go to trial. In this latter situation, however, Rule 56(d) imposes a duty upon the court to sift the issues and to specify which material facts are really in issue and which are not, thereby facilitating and expediting the trial. This pre-trial sifting of the issues upon a motion for summary judgment, as provided in Rule 56(d), is quite similar to the pre-trial procedure provided in Rule 16, except that under Rule 56(d) it is compulsory, while under Rule 16 it is discretionary with the court."

All argument of petitioner is met by the precise provisions of Rules 56(d) and 54(c), the former imposing the duty of inquiry and the latter the forthwith duty of immediate disposal by final judgment. Commentary upon the Rules has approved the application of both as necessary, and judicial decisions have approved the commentary and applied Rules 54(c) and 56(d). They show there is no novel question involved in their provisions or application.

In 3 Moores Federal Practice, Rule 56.03, p. 3183, we read the text and note as follows:

"'If either the proponent of a claim or the defending party moves for a summary judgment, and the court finds that the moving party is not entitled thereto, but that the other party is so entitled, it would seem that the court has the power to enter the proper judgment, although a cross-motion therefor was not made.' As the rule does not expressly cover this point a cross-motion for summary judgment would be advisable. * * *

. . . . . .

[8] "'Rule 54(c) gives the court the power to enter the final judgment to which the prevailing party is entitled, even if the party has not demanded such relief in his pleadings, except in default judgment cases. The theory is that the form of the pleadings should not place a limitation upon the power of the court to do justice. So where one party has invoked the power of the court to render a summary judgment against his ad-

versary, it is reasonable that this invocation gives the court power to render a summary judgment for his adversary if it is clear that the case warrants that result. (E. D. N. Y. C. P. R. (1937) 113: "If upon such motion made on behalf of a defendant it shall appear that the plaintiff is entitled to judgment, the judge hearing the motion may award judgment to the plaintiff, even though the plaintiff has not made a cross-motion thereto.")

Judicial decisions, applying the rules and the text commentary and note, are as follows:

United States v. *Erie County*, 8 F. R. D. 493, (U. S. D. C. W. D. N. Y.) (1940):

> "The Court had jurisdiction to dismiss the complaint. Upon the motion for summary judgment affidavits were submitted by each party and findings of fact and conclusions of law submitted by each party. No objection was raised to the entry of the judgment on the decision. The motion assumed the nature of a trial. Rule 56(d) contemplates that all issues may be decided on the motion, and Rule 54(c) provides that the court shall grant a judgment to which a party is entitled though not demanded in the complaint. Defendants did not move for summary judgment. The answers did demand judgment of dismissal. No issue is left to be determined. It would be an idle thing to have a new trial."

Northland Greyhound Lines v. *Amalgamated Association* (U. S. D. C. Minn.) (1946) 66 Fed. Supp. 431, 483, where only the plaintiff *Greyhound Lines* had moved for summary judgment, and where the above quoted text is approved:

> "The pleadings and affidavits are quite complete. They disclose the contractual relations between the parties for several years past including the facts leading up to the execution of the contract in suit. Although the parties draw different conclusions from certain facts, there is no controversion of any material fact and therefore no genuine issue for trial. Sum-

mary judgment is proper in such a case. Although Rule 56(c) provides in part 'the judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law', and defendants here have filed no cross-motion, it seems to me that where the case is properly disposable by summary judgment the court should enter whatever judgment is proper in the circumstances. This should be particularly true where the relief asked is a declaration of the rights of the parties to a contract under the Declaratory Judgment statute. While it may be the better practice to file a cross-motion I do not think that Rule 56(c) proscribes the court's power to enter judgment because of the mechanical failure of one of the parties to file a motion. This view finds support in 3 Moore's Federal Practice, Sec. 56.02 page 3183:

"'If either the proponent of a claim or the defending party moves for a summary judgment, and the court finds that the moving party is not entitled thereto, but that the other party is so entitled, it would seem that the court has the power to enter the proper judgment, although a cross-motion therefor was not made.'"

Hooker v. *New York Life Ins. Co.* (U. S. D. C. Texas) (1946) 66 Fed. Supp. 312, 318, where only the defendant moved for summary judgment and thereupon summary judgment was granted to plaintiff, and the note above quoted is expressly approved:

"There remains the question of the proper disposition of the case, since the plaintiff has not made a cross-motion for summary judgment. If the plaintiff had made such a motion, and if the defendant had admitted the facts which it so strongly urges, by way of affidavits, in favor of its motion, it would be clear that the plaintiff would be entitled to summary judgment. Since the purpose of the summary judgment procedure under Rule 56 is to expedite the disposition of actions

in which there is no genuine issue of fact requiring trial, it would seem that the court can properly enter a summary judgment in favor of the party entitled to it. 3 Moore, Federal Practice, Section 56.02.

"'Rule 54(c) gives the court the power to enter the final judgment to which the prevailing party is entitled, even if the party has not demanded such relief in his pleadings, except in default judgment cases. The theory is that the form of the pleadings should not place a limitation upon the power of the court to do justice. So where one party has invoked the power of the court to render a summary judgment against his adversary, it is reasonable that this invocation gives the court power to render a summary judgment for his adversary if it is clear that the case warrants that result.' Ibid., note 8.

"(11) The plaintiff is therefore granted summary judgment for $10,000, the amount of the double indemnity benefit."

It is here worthy of special note that Rules 54(c) and 56(d) were not amended in the recent revision of the Federal Rules.

The petition also contends petitioner should be heard on her tender after the appellate decision and now that her "testimony would tend to establish clear understandings among the parties (a) that she and her husband were not to assume responsibility for certain repairs effected under the respondent direction, and (b) that the respondents were to have no further interest in the property upon expiration of their three year repurchase option". (Quoted from Petition note (p. 9).)

These contentions were evidently available when the complaint was answered and not presented in the answer. Jointly with her husband petitioner took the title by assumption of $9,000 of mortgages, and by the option engaged to pay $6,000 to discharge their granted option, thus liquidating their liabilities as $15,000 and equalling the Filson investment. In the Walling decision, it appears the appellate court examined the case in the aspect of material

genuine issue of fact available to either party and found none, and likewise such examination herein preliminary to denial of the motion for modification was so made by the appellate court. There being no such available material fact in controversy, the previous direction of judgment for respondents was thereby confirmed.

CONCLUSION.

The power exercised and complained is but the full application of the pertinent Federal Rules, and the petition based on only part of the Rules is therefore without material merit and should be denied.

Respectfully submitted,

CAMDEN R. MCATEE,
Attorney for Respondents.